2001

State of Utah v. Gerald Doug Fridleifson : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
GERALD DOUG FRIDLEIFSON,	:	
Defendant/Appellant.	:	Case No. 20010392-CA

BRIEF OF APPELLEE

Appeal from a Conviction for Possession of a Controlled Substance, a Third Degree Felony, in Violation of UTAH CODE ANN. § 58-37-8(2)(a)(i) (Supp. 2001), in the Third Judicial District Court, Salt Lake County, Utah, the Honorable Timothy R. Hanson, Presiding

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May 17, 2002

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Re: *State v. Gerald Doug Fridleifson*,
Case No. 20010392-CA

Dear Ms. Stagg:

We have noted some mistakes in the tables for the State's Brief of Appellee in State v. Fridleifson, Case No. 20010392-CA, filed with the court on May 16, 2002. I have attached copies of the corrected tables to be filed with the original and copies of the brief. I apologize for the inconvenience.

Sincerely,

Lee Nakamura

LEE NAKAMURA
Legal Secretary
Criminal Appeals Division

cc: Linda M. Jones
Otis Sterling III

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JURISDICTIONAL STATEMENT

Defendant appeals his conviction for possession of a controlled substance (cocaine), a third degree felony, in violation of UTAH CODE ANN. § 58-37-8(2)(a)(i) (Supp. 2001). This Court has jurisdiction pursuant to UTAH CODE ANN. § 78-2a-3(2)(e) (Supp. 2001).

STATEMENT OF ISSUE AND STANDARD OF REVIEW

Did the trial court properly deny defendant's motion to suppress based on the determination that reasonable suspicion supported defendant's seizure?

A trial court's factual findings underlying its denial of a motion to suppress are reviewed for clear error. ***See State v. Galvan***, 2001 UT App 329, ¶ 5, 37 P.3d 1197; ***Salt Lake City v. Ray***, 2000 UT App 55, ¶ 8, 998 P.2d 274. The court's determination of reasonable suspicion is reviewed for correctness but, at the same time, accorded a "measure of discretion" as applied to a "given set of facts." ***State v. Pena***, 869 P.2d 932, 939 (Utah

1994). ***Accord State v. Beach***, 2002 UT App 160, ¶ 7.

CONSTITUTIONAL, STATUTORY, AND RULE PROVISIONS

This appeal is resolved by application of the reasonableness standard of the Fourth Amendment of the United States Constitution, which standard is codified in UTAH CODE ANN. § 77-7-15 (1999). Both provisions are reproduced in ***Addendum A***.

STATEMENT OF THE CASE

On February 12, 1999, defendant was charged with third degree felony possession of cocaine (R. 2-3). Subsequently, defendant claimed that the police unlawfully seized him and moved to suppress the cocaine found as a result of that seizure (R. 17-18). Following an evidentiary hearing and the submission of legal memoranda, the trial court denied defendant's motion to suppress (R. 20-36, 49-54). On August 19, 1999, the trial court entered formal findings of fact and conclusions of law (R. 65-67). ***See Addendum B*** *(Trial Court's Findings and Conclusions Denying Motion to Suppress)*. Defendant moved for reconsideration (R. 58-59). The trial court believed the motion was untimely, but considered its merits and affirmed the court's original denial (R. 74-75).

On January 11-12, 2000, a jury trial was held (R. 102, 125-27). The jury convicted defendant as charged (R. 125-27, 150). On April 13, 2001, defendant was sentenced to the statutory term of zero-to-five years imprisonment, which sentence was suspended and defendant placed on six months probation upon condition that he serve six months in jail (R. 163-64). Defendant timely appealed (R. 167).

STATEMENT OF FACTS

The facts surrounding defendant's seizure are largely uncontested; only their legal significance is disputed.[1]

The parties stipulated that the back basement apartment of a four-plex located at 342 Post Street was a "known drug house" (R. 50; R. 197: 75; R. 199: 2, 7-8).[2] The apartment had been under periodic surveillance for months by Salt Lake City Bicycle Squad Officer

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[1] The same judge heard the evidence at the preliminary hearing, the motion to suppress, and the trial (R. 20-21, 102, 199).

In challenging the court's denial, defendant cites only to the suppression hearing testimony. ***See Brief of Appellant [Br.Aplt.] at 3-7.*** This is proper because in seeking *reversal*, defendant, as appellant, must marshal the hearing evidence and, based on that evidence, demonstrate that the trial court's rulings are wrong. ***See State v. Coonce***, 2001 UT App 355, ¶ 6, 36 P.3d 533 (reaffirming marshaling requirement when an appellant challenges a trial court's findings and ruling). No such limitation applies in *upholding* a trial court's ruling. ***See United States v. Corral***, 970 F.2d 719, 723 (10th Cir. 1992) ("[i]n evaluating the correctness of the district court's rulings, the appellate court may consider the entire record developed from the trial even though such evidence may not have been presented during the suppression hearing"). ***Accord Dipoma v. McPhie***, 2001 UT 61, ¶ 18, 29 P.3d 1225 (recognizing the "well-settled" rule that an appellate court may affirm on any grounds "apparent on the record"); ***State v. Bredehoft***, 966 P.2d 285, 292 (Utah 1998), *cert. denied*, 982 P.2d 88 (Utah 1999); ***State v. South***, 924 P.2d 354, 355-57 (Utah 1996) (same). ***See also United States v. Muniz***, 1 F.3d 1018, 1021-22 (10th Cir.), *cert. denied*, 510 U.S. 1002 (1993); ***United States v. Basey***, 816 F.2d 980, 983 n.1 (5th Cir. 1987); ***State v. Young***, 576 So.2d 1048, 1054 n.1 & 1055 (La. App.), *cert. denied*, 584 So.2d 679 (La. 1991); ***State v. Duncan***, 879 S.W.2d 749, 751 (Mo. App. 1994) (all recognizing that an appellate court may consider pretrial and trial evidence in upholding a pretrial ruling). The State, therefore, cites primarily to the suppression hearing (R. 197), but also cites to the preliminary hearing (R. 199) and trial (R. 195 & R. 196) as helpful to an understanding of the record evidence which supports the trial court's ruling.

[2] A "drug house" is a residence where illegal drugs are sold (R. 197: 4-6; R. 195: 16, 97-98). Characteristically, a substantial number of persons will frequent the location, especially in the evening, stay for only 3-5 minutes, "just long enough for a drug deal," and then leave (*id.*).

Matt Larson, who was assigned to patrol drug houses and provide street drug interdiction (R. 197: 2-3, 11). During this time, the apartment's tenants changed, but the drug activity remained (R. 197: 14). Numerous drug arrests had been made (R. 197: 5, 10-12, 15-16; R. 195: 17). Officer Larson personally had arrested 4-6 individuals for drug offenses at that address (R. 197: 5-6, 10, 15, 21-22; R. 195: 94-95).

The surveillance was not constant. Periodically, Officer Larson and his partner would simply conceal themselves in the alleyway behind the four-plex where they could observe people coming and going from the basement apartment (R. 197: 18-19). The officers saw a lot of "foot traffic" at the address indicative of illegal drug sales (R. 197: 4; R. 195: 16-17). Typically, the suspected purchasers would enter the property from the back, near the alleyway where the officers were hiding, pass through the four-plex's fenced yard, and walk down the stairs to the basement apartment (R. 197: 12-13; R. 195: 17). Due to the incline of the basement stairs, the officers often could not see if the suspect actually entered the apartment (R. 197: 12-13, 17-18, 55). The stairs, however, led only to the apartment in question (*id.*). Typically, the suspected purchaser would remain out of sight for several minutes and then reappear at the top of the stairs (R. 197: 5, 12-13, 17). As the suspect walked back towards the alley, the uniformed officers would reveal themselves and ask to speak with him or her (R. 197: 12-13, 15-16). The officers were seeking a "reasonable explanation" of why the individual was frequenting a "known drug house" (R. 197: 20).

In the weeks just prior to defendant's arrest, Officer Larson stopped approximately 10-15 individuals leaving the apartment and arrested 3-5 of these individuals for drug

offenses, primarily possession of cocaine (R. 197: 10, 15-16, 21-22). Those not arrested were not necessarily cleared of suspicion. Sometimes, even though the officer suspected the person had purchased drugs at the apartment, probable cause for an arrest was lacking: "I think it's one thing to say you can't actually make the arrest because they don't have drugs in their pocket or they don't consent to a search. It's quite another thing to say, you know, they weren't there to buy drugs" (R. 197: 17, 21). Other officers also made drug arrests connected to the apartment during the same period (R. 197: 11).

On February 11, 1999, the day of defendant's arrest, Officer Larson observed foot traffic at the apartment consistent with drug sales (R. 197: 6). Around 2:00 or 3:00 p.m., the officer arrested one individual leaving the apartment for drug possession (R. 197: 7, 23-24; R. 195: 92). As this individual was being arrested in the four-plex's yard, defendant drove up, parked in the small parking area directly behind the yard, and walked onto the property (*id.*). Officer Larson told him that the police "were investigating drug activity there and that if he was there to purchase drugs now would be probably a good time for him to leave" (R. 197: 7, 25). Defendant said "thank you" and left (R. 197: 8).

That evening, around 8:00 p.m., Officer Larson and his partner returned to the alley and hid behind the apartment (R. 197: 8, 20). Defendant again drove up in his truck; but instead of parking directly behind the apartment as he had in the afternoon, defendant parked behind another house farther away and left his truck running (R. 197: 8, 37; R. 195: 44, 48-50, 93-94). Defendant walked through the fence onto the property and then proceeded down the stairs to the basement apartment (R. 197: 8). Due to their position and the dark, the

officers could not see defendant at the bottom of the stairs and could not see if he actually entered the apartment or conversed with its occupants (R 197: 20). The officers, however, assumed he did because he remained there for almost five minutes (R. 197: 8, 56; R. 195: 26, 94). Their assumption was correct: defendant subsequently admitted that he knocked on the apartment door and spoke to those inside (R. 197: 66-67).[3]

Because defendant's actions were consistent with those arrested at the apartment, the officers decided to question defendant (R 197: 8; R. 195: 96-98). The officers – dressed in bright yellow jackets marked with "police" in two-inch black letters – stepped out of their hiding place and faced defendant who was walking towards them from a few feet away (R. 197: 38-43, 57-59; R. 195: 27). Officer Larson's partner said, "Hi. Can we talk to you?" (R. 197: 8, 32, 51; R. 195: 55-56). Defendant turned "obliquely" and "might have gone a bit faster," forcing the officers to quicken their pace to keep up with him (R. 197: 8, 33-39, 41, 54). Officer Larson believed defendant was fleeing and if defendant got into his truck, the situation would become "more dangerous" (R. 197: 44, 59-60; R. 195: 104-05, 109).[4]

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[3] At the suppression hearing, defendant admitted that he went to the apartment, even though he knew it was a drug house, but claimed he did so to collect money allegedly owed him (R. 197: 64). According to defendant, he was only at the apartment 1-2 minutes and remained at the door conversing with the people inside (R. 197: 66-67).

[4] Up to this point, there is no dispute that the officers acted lawfully. At the suppression hearing, defendant conceded that the apartment was a known drug house and that the officers could lawfully ask to speak to persons coming and going from the premises (R. 197: 75-76). ***Accord Ray***, 2000 UT App 55, ¶¶ 11-12 (affirming well-settled authority that no legal justification is required for level I or voluntary encounters between citizens and police).

To prevent his escape, Officer Larson pushed defendant against the truck (R. 197: 44).[5] Defendant "really went out of control" and "starting freaking out" and acting "crazy" (R. 195: 22, 54, 56, 106). He threw a white object, which appeared to be drugs, over the truck into the apartment's yard (R. 197: 8, 45, 55, 60-61; R. 195: 22-23, 54, 60, 106, 113-14). It landed 10-20 feet away in the dirt (R. 197: 46; R. 195: 54, 56, 106).[6] Defendant flailed his elbows as if to hit the officers (R. 197: 44-45; R. 195: 56, 58, 60). Officer Larson punched defendant in the mouth to subdue him (R. 197: 8, 45; R.195: 106). The object thrown was recovered; it was a "twist" of cocaine (R. 197: 9, 47).

Before trial, the trial court concluded that reasonable suspicion supported defendant's seizure and denied defendant's motion to suppress the cocaine (R. 65-67; ***Addendum B***).[7]

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[5] Below, the parties agreed that the physical seizure of defendant elevated the level I encounter to a level II encounter requiring reasonable suspicion (R. 197: 73-74, 78). ***Accord Ray***, 2000 UT App 55, ¶¶ 11 & 18.

[6] Officer Larson's partner did not realize that Larson had already grabbed defendant when defendant threw the cocaine (R. 195: 22, 54). Officer Larson clarified that he seized defendant prior to the cocaine being thrown (R. 197: 59-60; R. 195: 106).

[7] Below, defendant denied throwing the cocaine and claimed it was not his (R. 197: 63; R.196: 228). A defendant who disclaims possession or ownership of an object may not challenge its admission on Fourth Amendment grounds unless he otherwise establishes that he has a legitimate expectation of privacy in the place searched or object seized. ***See, e.g., Rakas v. Illinois***, 439 U.S. 128, 139-40 (1978); ***State v. Scott***, 860 P.2d 1005, 1007-08 (Utah App. 1993); ***State v. Atwood***, 831 P.2d 1056, 1057-58 (Utah App. 1992); ***State v DeAlo***, 748 P.2d 194, 196-97 (Utah App. 1987). Here, the claimed illegality was not the seizure of the discarded cocaine, but the physical seizure of defendant's person, an act defendant clearly had "standing" to contest. Moreover, the trial court rejected defendant's claim that he threw nothing and accepted the officer's testimony that a twist of cocaine was thrown (R. 66, Finding #8; ***Addendum B***). Consequently, the trial prosecutor did not contest defendant's "standing" to challenge the admission of the cocaine found as a result of defendant's seizure.

At trial, essentially the same facts were presented. The jury rejected defendant's claim that the cocaine was not his and convicted him of possession as charged (R. 150).

SUMMARY OF ARGUMENT

Taken in context, the trial court's factual findings are not clearly erroneous. The facts leading up to defendant's seizure were essentially uncontested; only their legal significance was disputed. Therefore, while the formal factual findings contain one misstatement of the suppression hearing evidence, correction of that misstatement would not lead to a different result.

When viewed objectively, the record evidence supports the trial court's determination that a reasonable suspicion existed that defendant returned to the known drug house to purchase drugs. The police, therefore, had a legal basis to seize defendant when he attempted to elude their questioning. Once seized, defendant provided probable cause for his arrest by openly discarding a twist of cocaine. In sum, the trial court properly denied defendant's motion to suppress.

ARGUMENT

POINT I

WHILE THE TRIAL COURT'S FORMAL FACTUAL FINDINGS CONTAIN ONE MISSTATEMENT OF THE EVIDENCE, THAT MISSTATEMENT IS NOT SIGNIFICANT; IN CONTEXT, THE COURT'S FINDINGS PROPERLY REFLECT THE ESSENTIALLY UNDISPUTED EVIDENCE SUPPORTING DEFENDANT'S SEIZURE

It is defendant's burden to establish that the factual findings underlying the trial court's denial of his motion to suppress are clearly erroneous. ***See State v. Galvan***, 2001 UT

App 329, ¶ 5, 37 P.3d 1197; ***Salt Lake City v. Ray***, 2000 UT App 55, ¶ 8, 998 P.2d 274. To establish clear error, defendant must demonstrate that the factual findings, when viewed in the "light most favorable to the court's decision," are "against the clear weight of the evidence." ***State v. Martinez***, 2002 UT App 126, ¶ 16. In turn, this requires defendant to "marshal *all* of the evidence in support of the trial court's findings of fact and then demonstrate that the evidence, *including all reasonable inferences* drawn therefrom, is insufficient to support the findings against an attack." ***State v. Coonce***, 2001 UT App 355, ¶ 6, 36 P.3d 533 (citation and internal quotation marks omitted) (emphasis in original). The marshaling requirement places a heavy burden on defense counsel that

> "is not unlike becoming the devil's advocate. Counsel must extricate himself or herself from the client's shoes and fully assume the adversary's position. In order to properly discharge the duty of marshaling the evidence, the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists."

Id. (quoting ***West Valley City v. Majestic Inv. Co.***, 818 P.2d 1311, 1315 (Utah App. 1991)). Here, defendant has failed to meet this requirement.

Defendant's marshaling deficiency centers on his failure to fully acknowledge the evidence he conceded below. During the suppression hearing, defendant agreed that the basement apartment was a "known drug house" (R. 50; R. 197: 75). Yet, defendant now claims that the term "drug house" requires definition and infers that the police did not have reason to believe that drugs were being sold by the persons occupying the apartment. *See Brief of Appellant [Br.Aplt.] at 11.* The record is clear: defendant not only understood the

term "drug house," but he also referred to the same term below and conceded its factual existence in this case (R. 27, 33; R. 197: 4, 10-23, 75-76).

Defendant also conceded that the police – based on their knowledge of drug trafficking at the drug house – could permissibly question individuals, like defendant, who visited the location (R. 197: 76). Defendant's argument was that if an individual choose not to respond to the police, he or she should be permitted to leave, absent reasonable suspicion to support further detention (*id.*). The prosecutor and trial court agreed (R. 197: 73-74, 82).

Consequently, the issue below was limited: Given the essentially undisputed facts, did the police have reasonable suspicion to detain defendant when Officer Larson pushed him against the truck and prevented him from leaving? Only two facts relevant to this inquiry were disputed: (1) the length of time defendant remained at the drug house, and (2) the reason defendant spoke to its occupants.[8] The real dispute was not with the facts, but with their legal significance, that is, what inferences could permissibly be drawn from the essentially undisputed observations.

Defendant's other marshaling failure is his attempt to undermine the trial court's formal factual findings (R. 65-67) by attacking the court's memorandum decision (R. 49-54). ***See Br.Aplt. at 13-15.*** This is improper. The record evidence and formally-entered factual findings control – not the court's prior pronouncement of its decision. ***See State v. James***,

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[8] Of course, defendant also disputed that he threw the twist of cocaine, but this occurred after Officer Larson seized defendant. ***See*** *Statement of Facts at 7 & n.7.* Though irrelevant to the determination of reasonable suspicion, defendant's open discarding of the cocaine provided probable cause for his arrest.

858 P.2d 1012, 1015 (Utah App. 1993) (citing ***State v. Rio Vista Oil, Ltd.***, 786 P.2d 1343, 1347 (Utah 1990)). For this reason, the State does not respond to defendant's assertions that the prior memorandum decision contains factual inaccuracies.

Because defendant has failed to meet the marshaling requirement, this Court may summarily reject the merits of his challenge. ***See Coonce***, 2001 UT App 355, ¶ 6. But even if the Court considers the merits, it will find defendant's claim lacking. ***See*** *Point II, infra.*

To the extent defendant properly challenges the trial court's formal factual findings, he claims two findings are erroneous. First, defendant assails finding #2 because it states the afternoon arrest of the third party occurred "inside the apartment" (*Br.Aplt. at 11-12*). ***See Addendum B*** *(Trial Court's Findings and Conclusions Denying Motion to Suppress).* Defendant is correct that finding #2 misstates the record evidence. The evidence is undisputed that the afternoon arrest took place outside the apartment, in the yard just beyond the basement stairs (R. 197: 6-7, 23-26; R. 195: 92). This discrepancy does not, however, undermine the trial court's ultimate ruling. Defendant did not dispute that the apartment was an established drug house and did not dispute that the third party was arrested, in defendant's presence, for a drug offense connected to the apartment (R. 50; R. 197: 67, 75). Additionally, it was undisputed that the third party was arrested after leaving the suspect-apartment in the fenced yard area behind the apartment (R. 197: 23-24, 67; R. 195: 92-93). Since the evidence concerning the third-party arrest was either stipulated to or undisputed, there is no reason to believe that the trial court did not correctly understand it. Instead, a more plausible explanation for the discrepancy is that "inside" was simply typographically

erroneously inserted for "outside."[9]

In sum, while defendant establishes that finding #2 is erroneous as written, he has not shown that the discrepancy prejudiced him. ***See*** UTAH R. CRIM. P. 30 (mandating that insubstantial errors be disregarded and permitting the correction of clerical-type errors "arising from oversight and omission"). The exact location of the arrest was not significant, only the fact that it occurred in defendant's presence and was connected to drug sales in the apartment. These latter facts were undisputed. ***See*** *Statement of Facts at 5.*

Defendant next challenges factual finding #7, which states that when the police approached defendant, he "continued towards his truck at a rapid pace" (*Br.Aplt. at 12*). ***See Addendum B***. The record supports the court's finding. Officer Larson testified that when the officers asked to speak with defendant, they were face-to-face and only a few feet apart (R. 197: 38-43, 57-59; R. 195: 27). Defendant appeared to be "well aware that [the officers] were the police and he was in a certain amount of trouble" (R. 197: 41). Defendant "turned obliquely" and attempted to reach his truck before the police reached him (R. 197: 8, 33-39, 41, 54). Even though he did not run, the officers were forced to approach at a "faster pace" to keep up with defendant because he "might have gone a little bit faster" (R. 197: 8, 54). Officer Larson believed defendant was trying to "get away" or "escape"(R. 197: 59; R. 195:

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[9] Additionally, finding #2's syntax may be incorrect. The phrase "arrested an individual inside the apartment for a drug offense" may be referring to the location of the person when he purchased the drugs, not when he was arrested. This would be consistent with Officer Larson's suppression hearing testimony: "We had made a drug arrest of an individual coming out of the house we believed had bought drugs inside the house and Mr. Fridleifson was there at the time" (R. 197: 7).

105). This evidence, together with its reasonable inferences, is consistent with the finding that defendant continued at a "rapid pace."

Finally, defendant asserts that the trial court failed to properly consider other facts, which defendant claims would undermine the court's factual findings and ultimate legal conclusion (*Br.Aplt. at 15-16*). Defendant argues that the police "did not observe Fridleifson make contact with anyone at the apartment" (*Br.Aplt. at 15*). This is true and the trial court was well aware of this fact (R. 197: 20). Indeed, findings # 4 & #5 make clear that the police only observed defendant descend the stairs to the apartment and then ascend 5 minutes later (R. 66; ***Addendum B***). However, the officer's assumption that defendant spoke to the occupants of the apartment was not only reasonable, but true. Defendant admitted that he went to the suspect-apartment, knocked on the door, and made contact with the individuals inside (R. 197: 66-67).

Defendant next claims that the court's findings fail to reflect what the officers did not know, that is, exactly what transpired at the apartment and whether defendant was in fact a drug user (*Br.Aplt. at 15-16*). Defendant's argument confuses the reasonable suspicion standard with that of probable cause. As will be fully discussed, *Point II, infra*, the police were not required to have verified information that defendant purchased or possessed drugs to detain him temporarily for questioning. ***See State v. Leonard***, 825 P.2d 664, 668 (Utah App.) (recognizing that when police officers do not have evidence that a crime has been committed, they still have a duty to investigate suspicions), *cert. denied*, 843 P.2d 1042 (Utah 1992). ***See also State v. Gandy***, 766 So.2d 1234, 1236 (Fla. App. 2000) (holding that

reasonable suspicion of a drug sale does not require "observation of an actual exchange of money or contraband"). All that was required was an "articulable suspicion" that defendant was there for an illegal purpose. ***See State v. Deitman***, 739 P.2d 616, 617-18 (Utah 1987). ***See*** *Point II, infra.* Moreover, the trial court fully considered – but ultimately distinguished – the facts in this case from those in ***State v. Sykes***, 840 P.2d 825 (Utah App. 1992), which defendant claimed were nearly identical (R. 26-36, 49-54, 65-67; R. 197: 72-88). ***See*** *Point II, infra.*

In sum, while the trial court's formal factual findings contain one misstatement in factual finding #2, that misstatement is not significant. In context, the court's findings properly reflect the essentially undisputed facts surrounding defendant's seizure.

POINT II

BASED ON THE ESSENTIALLY UNDISPUTED EVIDENCE, TOGETHER WITH ITS REASONABLE INFERENCES, THE TRIAL COURT PROPERLY CONCLUDED THAT REASONABLE SUSPICION JUSTIFIED DEFENDANT'S DETENTION

A police officer may question an individual at will, but may not detain that individual involuntarily, unless the officer has a reasonable articulable suspicion that the individual has committed or is in the process of committing a crime. ***See Ray***, 2000 UT App 55, ¶¶ 12-13; ***Deitman***, 739 P.2d at 617-18. In this case, defendant conceded that the officers permissibly requested to speak with him (R. 197: 75-76). ***See*** *Statement of Facts at 6 n.4.* At the same time, the parties agreed that the level I encounter escalated to a level II encounter when Officer Larson physically seized defendant by pushing him against the truck (R. 197: 73-74).

See *Statement of Facts at 7 n.5.* Consequently, it is undisputed that reasonable suspicion was required to justify defendant's seizure.

While the parties agreed on the facts and the applicable legal standard, they disagreed on the reasonable inferences to be drawn from those facts. Properly, the trial court drew the inferences in favor of the prosecution and denied defendant's motion to suppress. ***See State v. Beach***, 2002 UT App 160, ¶ 8 (acknowledging deference given to "an officer's ability to distinguish between innocent and suspicious actions") (citation and quotation marks omitted). ***See also Illinois v. Wardlow***, 528 U.S. 119, 125 (2000) (recognizing that pursuant to ***Terry v. Ohio***, 392 U.S. 1, 30 (1968), even when the evidence is "ambiguous and susceptible of an innocent explanation," the Fourth Amendment favors a limited detention to resolve to "resolve the ambiguity").

The United States Supreme Court has recently reaffirmed the appropriate approach in determining reasonable suspicion. ***See United States v. Arvizu***, 534 U.S. 266, 122 S. Ct. 744 (2002). Rejecting the "divide-and-conquer" analysis used by some courts, the federal supreme court emphasized that police observations cannot be considered in isolation, but must be viewed as a whole and evaluated in light of a police officer's "experience and specialized training." 122 S. Ct. at 750-51. ***See also Gandy***, 766 So.2d at 1236 ("[a] 'founded suspicion' is a suspicion which has some factual foundation in the circumstances observed by the officer, when those circumstances are interpreted in the light of the officer's knowledge") (citation and quotation marks omitted). "A determination that reasonable suspicion exists, however, need not rule out the possibility of innocent conduct." ***Arvizu***,

122 S. Ct. at 753. ***Accord Wardlow***, 528 U.S. at 126 (recognizing that ***Terry*** "accepts the risk that officers may stop innocent people"). Thus, even when "each of the series of acts [is] 'perhaps innocent in itself,'" reasonable suspicion exists when the acts, as a whole, suggest "legal wrongdoing." ***Arvizu***, 122 S. Ct. at 750-51 (quoting ***Terry***, 392 U.S. at 22). ***Accord Beach***, 2002 UT App 160, ¶¶ 10-11 (same).

Defendant acknowledges ***Arvizu*** in a string cite, ***see*** *Br.Aplt. at 23*, but ignores its teachings and precedent. Instead, relying primarily on ***State v. Potter***, 863 P.2d 40 (Utah App. 1993), ***Sykes***, 840 P.2d 825, and ***State v. Steward***, 806 P.2d 213 (Utah App. 1991), defendant argues that his "mere presence" at a location associated with illegal activity is insufficient to establish reasonable suspicion. ***See*** *Br.Aplt. at 17-24*. The State agrees. ***See Brown v. Texas***, 443 U.S. 47, 52 (1979) (holding that the mere presence of a suspect in a "neighborhood frequented by drug users, standing alone" does not establish reasonable suspicion if the suspect's activity is "no different from the activity of [law-abiding] pedestrians in that neighborhood"). But as the trial court correctly concluded, this defendant was more than merely present in a neighborhood frequented by drug users.

Earlier in the day, defendant parked directly behind the four-plex, entered its fenced yard, observed a third party being arrested for drug possession, was told the location was being investigated for drug activity, and left after being warned to leave if he was there to purchase drugs (R. 197: 7-8, 23-25; R.195: 92). Thus, unlike the cases cited by defendant, ***see*** *Br.Aplt. at 17-24*, the evidence here established that (1) the police positively knew on the day in question that the occupants of the suspect-apartment were trafficking drugs, and (2)

the defendant knew that the apartment he was frequenting was currently and actively trafficking in drugs and had been warned to stay away. ***Compare Potter***, 863 P.2d at 43-44 (finding no basis to detain the defendant where the police only knew that drugs had been *consumed* at the location sometime prior to the defendant's arrival and there was no evidence that defendant was aware of this fact); ***Sykes***, 840 P.2d at 828 (finding no reasonable suspicion where the police only knew that a drug sale had occurred in the general area and were just beginning to investigate a neighbor's complaint that people were coming and going at "all hours" when they observed defendant at the house for 3 minutes); ***Steward***, 806 P.2d at 216 (finding no reasonable suspicion where the defendant drove into a cul-de-sac during a drug search).

While defendant claimed that he went to the apartment in the afternoon to collect a debt, the record establishes that defendant did not offer this explanation until the motion to suppress (R. 197: 8, 25, 64). Moreover, whether defendant claimed to be there for an innocent reason or not, the police were entitled to objectively infer that defendant was there to purchase drugs based on his response to their warning:

> I told him that we were investigating drug activity there and that if he was there to purchase drugs now would be probably a good time for him to leave. . . . He left. . . . I think he said thank you.

(R. 197: 8).

> Q: All right and the most that he said according to you was, Well thanks, bye.
> A: Yes.
> Q: And he left?
> A: Yes.

(R. 197: 25) Thus, not only is defendant's claim of an innocent motive irrelevant to the determination of reasonable suspicion, ***see Arvizu***, 122 S. Ct. at 750-753, but in this case, defendant's belated claim of innocence is inconsistent with his actions at the scene – both that afternoon and later that evening. ***See Beach***, 2002 UT App 160, ¶ 11 (recognizing that an officer need not accept an "innocent" explanation truthful, "particularly when [the officer] observed other suspicious actions" by the defendant). Instead, the reasonable inference from defendant's response is that defendant went to the drug house in the afternoon to purchase drugs.[10] ***Compare Potter***, 863 P.2d at 41 (finding no evidence from which to infer defendant's intent in going to the suspect-trailer sometime after its occupants had smoked marijuana); ***Sykes***, 840 P.2d at 826 (finding no evidence of the defendant's intent in going to the suspect-house where police had only begun their surveillance of the house 15 minutes before based on a neighbor's complaint that people were there at "all hours"); ***Steward***, 806 P.2d at 216 (concluding that the "mere driving of a pickup truck on a public road, at 11:50 p.m., is insufficient, without more, to raise reasonable suspicion that its occupant was involved in criminal activity").

After it was dark, defendant came back to the apartment. This time he did not park directly behind the apartment even though, by his own admission, there may have been

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[10] Even if the reasonable suspicion standard permitted consideration of a defendant's innocent explanations, which it does not, ***see Arvizu***, 122 S. Ct. at 750-53, no such consideration would be appropriate in this case because the court implicitly rejected the credibility of defendant's testimony (R 66, ***Addendum B*** *Finding #8*). ***See State v. Daniels***, 2002 UT 2, ¶ 18, 40 P.3d 611 (acknowledging deference given to trial court's assessment of credibility).

parking available there (R. 197: 68). Instead, defendant choose to park further away, behind a different house (R. 197: 37, 68; R. 195: 93-94). He left his truck running (R. 195: 44). These facts support the reasonable inference that defendant was approaching the known drug house in sleuth, knowing the police might possibly return, and intended to stay at the apartment only momentarily. ***Compare Potter***, 863 P.2d at 40-41; ***Sykes***, 840 P.2d at 826; ***Steward***, 806 P.2d at 214 (none containing any facts suggesting that the defendant in question returned to the suspect-location more than once or approached the location surreptitiously).

By his own admission, defendant went to the suspect-apartment, knocked on the door, and conversed with the occupants (R. 197: 66-67).[11] While defendant claimed he was only at the apartment 1-2 minutes, the trial court accepted the officer's testimony that defendant remained at the apartment for almost 5 minutes, a time typical for a drug sale (R. 66; R. 197: 4). ***See Addendum B***. The officer's reasonable objective assessment, based on the totality of defendant's conduct, was that he returned to the drug house to purchase drugs. ***See Arvizu***, 122 S. Ct. at 752 (recognizing that a police officer is "entitled to make an assessment of the situation in light of his specialized training and familiarity with the customs of the area's inhabitants"); ***Cortez***, 449 U.S. at 417-19 (holding that reasonable suspicion must be

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[11] At the time, the officers did not know for a fact that defendant had conversed with the occupants, but the officers reasonably suspected he had based on their experience and the surrounding facts. It is disingenuous for defendant to now claim that their assumption was unreasonable when, by his own admission, it is true. ***See United States v. Cortez***, 449 U.S. 411, 418 (1981) (recognizing that reasonable suspicion is based on "probabilities," not "hard certainties").

assessed based on "the modes or patterns of operation of certain kinds of lawbreakers" and "common sense conclusions about human behavior"); ***Brown***, 443 U.S. at 52 n.2 (recognizing that "a trained, experienced police officer [may be] able to perceive and articulate meaning" from conduct which would appear to "be wholly innocent to the untrained observer"). ***Accord Beach***, 2002 UT App 160, ¶ 8 (recognizing that, in addition to an officer's experience, an officer's belief must be judged "in light of common sense and ordinary human experience") (citation and quotation marks omitted).

Nevertheless, defendant condemns the police for not knowing exactly what occurred between defendant and the apartment's occupants. ***See*** *Br.Aplt. at 24*. If the police had actually observed or overheard a hand-to-hand drug transfer at the apartment door, probable cause for defendant's arrest would have been established. Instead, because this information was missing, the police had reasonable suspicion based on their established knowledge of drug trafficking at the apartment and the consistency of defendant's actions with others arrested for possession at that location. ***See State v. Holmes***, 774 P.2d 506, 509 (Utah App. 1989) (distinguishing between situations where the police merely "allege that an individual was doing 'something' in the wrong place and at the wrong time," and cases in which reasonable suspicion is found because the police observe "a particular type of behavior which [is] consistent not only with criminal activity, but also with the reputation of the area"). ***See also State v. Davis***, 821 P.2d 9, 12 (Utah App. 1991) (recognizing that even when "there may be a host of other innocent explanations," facts may reasonably be interpreted to support an inference of criminality); ***State v. Menke***, 787 P.2d 537, 540-41

(Utah App. 1990) (recognizing that reasonable suspicion standard permits an officer, based on his experience, to infer criminality from seemingly innocent facts, but requires the officer to "*articulate* what it is about those facts which leads to an inference of criminal activity") (emphasis in original).

In sum, when the police observed defendant ascend the basement stairs, they had a reasonable suspicion to seize and temporarily detain him for questioning. ***See Arvizu***, 122 S. Ct. at 751 (reaffirming that under the reasonable suspicion standard, "the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard") (citation omitted); ***Cortez***, 449 U.S. at 418 & 421 (recognizing the "limited" intrusion upon privacy a ***Terry*** stop and questioning entails and, therefore, the minimal level of justification necessary). ***See also United States v. Griffin***, 909 F.2d 1222, 1223 (8th Cir. 1990) (concluding that reasonable suspicion supported stop where agents twice observed the defendant at suspect locations; actions conformed to known pattern of drug trafficking), *cert. denied*, 498 U.S. 1038 (1991); ***United States v. Buchannon***, 878 F.2d 1065, 1066-67 (8th Cir. 1989) (finding probable cause for search where the defendant was observed leaving established drug house with a diaper bag and baby and a second vehicle left with him; actions conformed to known pattern of drug trafficking); ***State v. Dickerson***, 481 N.W.2d 840, 842-43 (Minn. 1992) (holding that reasonable suspicion was established where the defendant was observed at a known drug house and when he made "eye contact" with the police, he abruptly walked in different direction; actions conformed to known pattern of drug

trafficking), *affirmed*, ***Minnesota v. Dickerson***, 508 U.S. 366, 377-79 (1993) (recognizing "plain feel" as justification for seizure of nonthreatening contraband during valid ***Terry*** pat down).

Defendant's response to the police presence further supports his seizure. After defendant left the apartment and ascended the stairs to the backyard, the police revealed themselves and asked to speak with him (R. 197: 8, 32, 38-43, 51, 57-59; R. 195: 27, 55-56). Defendant quicken his pace "a bit," turned "obliquely," and tried to reach his truck in what appeared to be an attempt to flee (R. 197: 8, 33-39, 41, 44, 54, 59-60; R. 195: 104-05, 109). Certainly, a suspect is free to ignore a level I request to speak with an officer. ***See Ray***, 2000 UT App 55, ¶ 11. But if in ignoring the request, the suspect also attempts to flee, that response may be considered in determining reasonable suspicion. ***See Beach***, 2002 UT App 160, ¶ 11 (recognizing that a suspect's "haste to exit the scene when first approached" is a valid factor to consider in determining reasonable suspicion); ***State v. Talbot***, 792 P.2d 489, 493-94 (Utah App. 1990) (holding that the "mere act of avoiding confrontation" with the police does not, alone, create an articulable suspicion, but recognizing that flight, when coupled with other "indicia of criminality" may create a reasonable suspicion) (citations omitted). ***See also Wardlow***, 528 U.S. at 124-25 (acknowledging a suspect's right to refuse to cooperate in the face of police questioning, but recognizing the relevancy of a suspect's resultant "nervous, evasive behavior" or "unprovoked flight" since either is "suggestive" of wrongdoing); ***Dickerson***, 481 N.W.2d at 843 (holding that "defendant's evasive conduct after eye contact with police, combined with his departure from a building with a history of

drug activity, justified police in reasonably suspecting criminal activity"); ***In the Interest of D.M.***, 781 A.2d 1161, 1165 (Penn. 2001) (holding that a suspect's flight when the police approach to question him is "clearly relevant in determining whether the police demonstrated reasonable suspicion to justify a ***Terry*** stop under the totality of the circumstances").

In sum, the trial court properly concluded that the facts in this case, together with their reasonable inferences, established reasonable suspicion that defendant had committed or was attempting to commit a crime.

CONCLUSION

This Court should affirm the denial of the motion to suppress. Since defendant does not otherwise challenge the evidence, his conviction for third degree felony possession of a controlled substance should be affirmed.[12]

RESPECTFULLY SUBMITTED this 16th day of May, 2002.

MARK L. SHURTLEFF
Attorney General

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Assistant Attorney General
Attorney for Plaintiff/ Appellee

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[12] Defendant claims that if this Court reverses the trial court, the case must be remanded for "dismissal of the charge, or in the alternative, for a new trial." ***See*** *Br.Aplt. at 32.* This is incorrect. Should this Court overrule the trial court, the proper remedy is to reverse defendant's conviction and remand for a new trial. ***See, e.g., Galvan***, 2001 UT App 329, ¶ 17; ***Ray***, 2000 UT App 55, ¶ 21. The prosecutor is then entitled to determine if she has sufficient evidence to go forward without the admission of the cocaine. Admittedly, the ability to go forward without the drugs is unlikely, but it is the right of the prosecutor to make that determination based on independent evidentiary sources.

CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing BRIEF OF APPELLEE were mailed, postage prepaid, to LINDA M. JONES, SALT LAKE LEGAL DEFENDER ASSOCIATION, attorneys for defendant/appellant, 424 East 500 South, Suite 300, Salt Lake City, UT 84111.

DATED this 16 day of May, 2002.

ADDENDA

ADDENDUM A

77-7-15. Authority of peace officer to stop and question suspect — Grounds.

A peace officer may stop any person in a public place when he has a reasonable suspicion to believe he has committed or is in the act of committing or is attempting to commit a public offense and may demand his name, address and an explanation of his actions. 1980

AMENDMENT IV

[Unreasonable searches and seizures.]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ADDENDUM B

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By E. Thompson

**IN THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH**

THE STATE OF UTAH, Plaintiff,	)	**FINDINGS OF FACT AND CONCLUSIONS OF LAW**
vs.	)	
GERALD D. FRIDLEIFSON,	)	Case No. 991903218 FS
Defendant.	)	Honorable Timothy R. Hanson

THE ABOVE-ENTITLED MATTER, HAVING COME BEFORE THE COURT for an Evidentiary Hearing for the Defendant's Motion to Suppress on May 17, 1999, at 2:00 p.m. The Honorable Timothy R. Hanson presiding. The Defendant was present and represented by Otis Sterling of the Legal Defenders Association. The State was represented by Lana Taylor, Deputy District Attorney for Salt Lake County. Based upon the testimony, arguments of counsel and evidence presented at the hearing, and for good cause shown, the Court now makes and enters the following:

FINDINGS OF FACT

1. On January 11, 1999, Salt Lake City Police Officer Matt Larson, saw the Defendant behind an apartment, known to law enforcement as a "known drug house."

2. On that date, the Defendant was present when Officer Larson arrested an individual inside the apartment for a drug offense.

3. Officer Larson told the Defendant that he should leave if he was there to buy drugs. The Defendant thanked Officer Larson and left.

4. Later that same day, Officer Larson saw the Defendant park his truck down the street and walk down the stairs to the same apartment.

5. After five minutes the Defendant walked back up the stairs and started back to his truck.

6. Officer Larson and Officer Washington then approached the Defendant from the front, dressed in bright yellow jackets, and told him to stop.

7. The Defendant did not stop, but continued towards his truck at a rapid pace.

8. The Officers then stopped the Defendant, who threw an object into the air, which later turned out to be a twist of cocaine.

FROM THE FOREGOING FINDINGS OF FACT, THE COURT NOW MAKES AND ENTERS THE FOLLOWING:

CONCLUSIONS OF LAW

1. Under the totality of the circumstances, Officer Larson had reasonable articulable suspicion, based upon objective facts, that the Defendant was engaged in unlawful drug activity when he stopped the Defendant.

2. Officer Larson effectuated a lawful Level II detention of the Defendant that did not violate his rights under either the United States Constitution or the Utah Constitution.

3. Officer Larson did not exceed the scope of the stop because he had probable cause

to effectuate an arrest after the Defendant threw the twist of cocaine into the air.

DATED this 19 day of August, 1999.

BY THE COURT

TIMOTHY R. HANSON
District Court Judge